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In the Supreme Court of the United States

OCTOBER TERM, 1974

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

ST. JOE MINERALS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–12a) is reported at 508 F. 2d 743.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1975 (App. B, *infra*, p. 13a). On April 21, 1975, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 29, 1975. On May 19, 1975, Mr. Justice Brennan extended the time for filing a petition for a

writ of certiorari to and including June 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, prior to approving a state implementation plan under Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c–5(a)(2), the Administrator of the Environmental Protection Agency is required to determine that no sources of emissions in the state will be unable, due to economic or technological infeasibility, to comply with the plan's requirements.

STATUTE INVOLVED

Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c–5(a)(2), is set forth in Appendix C, *infra*, p. 14a.

STATEMENT

Pursuant to Section 110 of the Clean Air Act, 42 U.S.C. 1857c–5, each state is required to adopt and submit to the Administrator of the Environmental Protection Agency ("EPA") a plan providing for the implementation, maintenance, and enforcement of the national "primary" and "secondary" ambient air quality standards within the air quality control regions in that state. National primary standards are those "requisite to protect the public health," while secondary standards are those "requisite to protect the public welfare." Section 109(b), 42 U.S.C. 1857c–4(b). The Administrator must approve or disapprove a state plan within four months of its submission. 42 U.S.C. 1857c–5(a)(2). If he determines that the plan meets the requirements of Section 110(a)(2)(A)–(H), 42 U.S.C. 1857c–5(a)(2)(A)–(H), he is required to approve the plan. If he finds the state plan deficient, then he must disapprove it and, after giving the state an opportunity to revise the plan, propose and promulgate his own regulations correcting the deficiency. 42 U.S.C. 1857c–5(c).

On January 27, 1972, the Commonwealth of Pennsylvania submitted its implementation plan to the Administrator, who, on May 31, 1972, approved the provisions of the plan at issue here. 37 Fed. Reg. 10842, *et seq.* On June 26, 1972, respondent filed in the court of appeals a petition for review challenging the Administrator's approval of the Pennsylvania plan. One of the grounds on which respondent challenged EPA's approval was that certain of the emission limitations concerning sulfur oxides (25 Pa. Code Regs. § 123.21(b)), were infeasible on economic and technological grounds as applied to respondent's zinc smelter at Monaca, Pennsylvania. After a series of procedural developments set out in the margin,[1] the

[1] Having consolidated the petition for review with another such petition, the court of appeals initially decided that EPA was required either to give the petitioners before it a hearing concerning their claims of infeasibility or to defer enforcement of the plan against them pending resolution of their challenges to the plan at the state level. *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F. 2d 1, 10 (C.A. 3). On remand EPA elected the first alternative and, after providing an opportunity for comments by both sides on the feasibility issues, filed with the court of appeals the augmented record and its conclu-

court of appeals concluded that, in determining whether to approve a state implementation plan, EPA is required to consider whether the emission limitations contained in the plan are economically and technologically feasible, and, if EPA determined they were not, it could not validly approve the plan. Because EPA had found in this case (see pp. 3–4, n. 1, *supra*) that the portion of the Pennsylvania plan for controlling sulfur oxide emissions was not technologically feasible as applied to respondent's plant, the court vacated EPA's approval of that plan.

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals, in rejecting EPA's considered interpretation of the Clean Air Act, is contrary to the language and purpose of the Act as construed in this Court's subsequent decision in *Train* v. *Natural Resources Defense Council, Inc.*, No. 73–1742, decided April 16, 1975 ("*NRDC*").

In *NRDC* this Court held that EPA is required to approve a state implementation plan unless it contravenes one of the eight specific requirements of Section

sion that the sulfur oxide emissions limitations of the Pennsylvania plan were technologically infeasible as applied to respondent's Monaca smelter (Pet. App. 4a). Regarding himself as being precluded from disapproving the plan on that ground, the Administrator notified Pennsylvania of his determination of technological infeasibility and requested that it revise its plan in that regard. The Administrator also stated his intention to stay federal enforcement of that portion of the plan applicable to respondent's smelter pending administrative and judicial review at the state level (*ibid.*).

110(a)(2) of the Act, 42 U.S.C. 1857c–5(a)(2).[2] As the court below acknowledged (Pet. App. 9a), none of those requirements specifically deals with the issues of economic or technological feasibility.[3] As this Court noted in *NRDC*, although the Act does address such issues, it does so with respect to state implementation plans[4] only in the limited contexts of Section 110(c) of the Act, 42 U.S.C. 1857c–5(c), authorizing EPA to approve a state's application to extend at the

[2] *NRDC* dealt with EPA's authority to approve a state's "revision" of a plan it had previously approved, but since EPA's authority to approve revisions is subject to the same limitations as is its authority to approve plans in the first instance (42 U.S.C. 1857c–5(a)(3)), the Court's analysis has a direct and controlling bearing on the question in this case concerning EPA's initial approval of a plan.

[3] The court of appeals asserted that to require EPA to review the feasibility of all requirements of an implementation plan "is not inconsistent with the statutory language" (Pet. App. 9a–10a), referring to the requirement of Section 110(a)(2)(A) that a plan provide for attainment of national primary standards "as expeditiously as practicable * * *" and of secondary standards within "a reasonable time * * *." 42 U.S.C. 1857c–5(a)(2)(A)(i), (ii). However, that these temporal limitations were not intended to require EPA to consider feasibility for all sources is indicated by the fact that "in no case" may the plan provide for attainment of primary standards later than three years from its approval. 42 U.S.C. 1857c–5(a)(2)(A)(i).

[4] With respect to court actions to abate air pollution through the "conference" procedure (which is inapplicable to air pollutants for which a national primary or secondary ambient air quality standard is in effect (42 U.S.C. 1857d(b)(4)), the courts are required to give "due consideration * * * to the physical and economic feasibility of securing abatement of any pollution proved * * *." 42 U.S.C. 1857d(h).

outset, for up to two years, the three-year period within which each state must attain national primary ambient air quality standards, and of Section 110(f), 42 U.S.C. 1857c–5(f), authorizing EPA to approve a state's application to postpone for one year a requirement of a state implementation plan that has already been approved by EPA (see *Train* v. *NRDC, supra,* slip op. at 13–15, 22–24).

The legislative history of the 1970 Amendments reveals that Congress was well aware of the possibility that some polluters might be unable or unwilling to implement the emission control measures required by a state plan to attain or maintain national air quality standards, and so would "be closed down." S. Rep. No. 91–1196, 91st Cong., 2d Sess. 3 (1970). That possibility reflects the purpose of the Amendments "to force technology to meet specified, scheduled standards * * *" (*Train* v. *NRDC, supra,* slip op. at 28), and is implicit in "the Act's encouragement of the States to adopt plans even stricter than those required to attain national standards." *Id.* at 12.

The Act leaves the states with "considerable latitude in determining specifically how the [national air quality] standards would be met." *Id.* at 25. Thus, "the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation" (*id.* at 17), and thereafter has "continuing authority to revise choices about the mix of emission limitations." *Id.* at 25.[5] "[S]o long as the ultimate

[5] Should compliance with a requirement originally included in a state plan prove to be truly infeasible for some sources, the state could consider revising its plan at any time to grant them variances, so long as the revision does not compromise timely attainment and maintenance of national air quality standards within the state. *Train* v. *NRDC, supra,* slip op. at 36–37. There is no reason to assume that sources with *bona fide* claims of infeasibility would be unable to secure variances.

effect of a State's choice of emission limitations is compliance with the national standards for ambient air" (*id.* at 17), "[t]he Act gives the agency no authority to question the wisdom of a State's choices of emission limitations * * *." *Ibid.*

In sum, the Act permits a state to choose to include in its implementation plan emission limitations that for some sources are economically or technologically infeasible. EPA's interpretation of the Act as (1) not requiring it to consider claims of such infeasibility when determining whether to approve a state plan, and (2) not permitting it to disapprove a plan because of such infeasibility, "was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency." *Id.* at 25; see *id.* at 13.

2. The decision of the court of appeals conflicts directly with decisions of the Sixth, Seventh and Eighth Circuits.[6] As matters now stand, EPA's responsibility in approving state implementation plans and its duty to consider claims regarding the technological or economic feasibility of such plans for sources of emissions vary from circuit to circuit.

[6] The Fourth Circuit has stated in *dicta* that it is "inconceivable" that EPA would not evaluate the technological and economic aspects of state plans, and that "such evaluation [would not be] inappropriate." *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495, 506 (C.A. 4).

Thus, the Sixth Circuit held in *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F. 2d 162, that polluters "are not entitled to raise their claims of high cost-benefit, technological infeasiblity and resource unavailability prior to the Administrator's approval of the state plans * * *." *Id.* at 173. The court noted that Congress required EPA, within a four-month period, to review and act on the implementation plans of all 50 states, "affecting virtually every pollutant source in the United States" (*ibid.*), and that it could not be expected in that process to hear such "complex and intricate claims" concerning particular polluters. *Id.* at 172.[7]

In *Indiana & Mich. Elec. Co.* v. *Environmental Protection Agency*, 509 F. 2d 839 (C.A. 7), decided prior to the decision below, the Seventh Circuit followed the Sixth and held "that a plan's technological feasibility and economic impact are not among the factors which the Administrator is obliged to consider under Section 110(a)(2) * * *." *Id* at 844.[8]

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[7] The court added in *dicta* that an individual polluter's claim of infeasibility of a plan requirement could be asserted as a defense in a federal or state enforcement proceeding, and that, because such claims could not be raised on judicial review of EPA's approval of a state plan, the preclusion provision of the Act (42 U.S.C. 1857h–5(b)(2)) would be inapplicable. 481 F. 2d at 173. As no enforcement proceedings are involved here, the correctness of the Sixth Circuit's assumption is not directly at issue on this petition.

[8] The court also stated in *dicta* that it agreed with the Sixth Circuit (see n. 7, *supra*) that such claims may be of significance in enforcement proceedings. 509 F. 2d at 844–845.

Most recently the Eighth Circuit, following the Sixth Circuit's decision in *Buckeye* on this issue, likewise concluded that "[i]t is clear that Congress intended to preclude economic and technological factors from the Administrator's consideration of whether to approve an implementation plan," and that "[e]ven if these grounds are considered by the Administrator, the mandatory and directory language of § 110(a)(2) would preclude using such grounds as a basis for setting aside his action on a petition for review under § 307(b)(1)." *Union Elec. Co.* v. *Environmental Protection Agency*, No. 74–1614 (C.A. 8), filed March 27, 1975, slip op. 17–18, petition for a writ of certiorari filed June 9, 1975, No. 74–1542.

3. Even if limited in effect to the heavily-industrialized states within the Third Circuit (but see p. 7, n. 6, *supra*), the decision of the court of appeals would have a severe and adverse effect on EPA's ability to cope with its "sharply increased * * * responsibility in the continuing effort to combat air pollution." *Train* v. *NRDC*, *supra*, slip op. at 2–3. The court of appeals' interpretation of the Clean Air Act appears to impose on EPA the enormously difficult and burdensome task of considering and determining whether each element of a state's implementation plan is economically and technologically feasible for all sources of emissions affected by the plan.[9] In addition, by holding that individual claims of infeasibility must be considered by EPA at the plan approval

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[9] EPA advises that in Pennsylvania alone there are about 4,800 point sources of pollutants covered by national standards.

stage (and may be pursued on judicial review of EPA's approval of a plan), the decision invites polluters to raise such issues even when they are only potentially present; otherwise, the polluters would be precluded from exercising any right they may have to assert such claims in enforcement actions (see p. 8, n. 7, *supra*). EPA could not cope with such demands on its limited resources within the four-month period Congress has allotted it for acting on implementation plans or revisions thereof. 42 U.S.C. 1857c–5(a)(2), (3).

These difficulties are compounded by the fact that neither the Act nor the court's decision provides any specific standard for determining whether the application of a requirement of a state plan to a particular polluter is economically or technologically infeasible—a situation that also invites litigation.

Athough EPA has already approved the initial round of state implementation plans, the administrative problems created by the decision below are still significant. A second round of plan approvals lies ahead because of the need to revise approved plans that have not in fact resulted in timely attainment of national standards or do not result in their maintenance after the attainment dates.[10]

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[10] Most attainment deadlines for primary standards are just now passing, and EPA is engaged in a comprehensive review to determine whether the state plans have attained national standards. Preliminary results indicate that there is significant non-attainment.

In addition, EPA expects that it will in due course adopt national standards for additional pollutants or revised standards for those covered by existing standards, which would also occasion another round of plan approvals.

Finally, since EPA must review revisions of state plans under the same standards applicable to review of the plans themselves (42 U.S.C. 1857c-5(a)(3); *Train* v. *NRDC*, *supra*), the decision below may mean that EPA must now consider feasibility claims in connection with the numerous variances and other revisions it reviews.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1975.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1543

ST. JOE MINERALS CORPORATION,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

Argued December 10, 1974

Before: ALDISERT, ADAMS and HUNTER, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 29, 1975)

ADAMS, *Circuit Judge.*

The pivotal issue in this appeal is whether the Administrator of the Environmental Protection Agency is vested with the authority to disapprove a state implementation plan, or one of its provisions, drafted pursuant to the Clean Air Act Amendments of 1970, when the Administrator has found such plan to be "technologically infeasible."

I.

Under the Clean Air Act Amendments of 1970, the Administrator of the Environmental Protection Agency is directed to promulgate national primary [1] and secondary [2] ambient air quality standards for each air pollutant designated by the Administrator as having an adverse effect upon the public health or welfare.[3]

The states are each required to develop an air pollution control scheme by which the national ambient air quality standards may be achieved within each state. The implementation plan of each state must then be submitted for the approval of the Administrator.[4]

Upon approval by the Administrator, the implementation plan developed by each state may be enforced by the

1. Primary ambient air quality standards are those necessary, in the Administrator's judgment, to protect national health. 42 U.S.C. § 1857c-4 (Supp. 1974).

2. Secondary ambient air quality standards are those necessary, in the Administrator's judgment, to preserve the general welfare. 42 U.S.C. § 1857c-4 (Supp. 1974).

3. 42 U.S.C. § 1857c-3, 1857c-4 (Supp. 1974). The Administrator is to include in the list of pollutants all substances for which air quality criteria had previously been established and any others which, in the Administrator's opinion, (1) detracted from the public health or welfare; (2) originated from numerous sources; and (3) merited controls.

4. 42 U.S.C. § 1857c-4 (Supp. 1974). For a more complete description of the procedure, *see* Duquesne Light Co. v. E.P.A., 481 F.2d 1 (3d Cir. 1973); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973).

Administrator, as well as the state. Under federal law, fines and sentences of imprisonment may be imposed on those who refuse to comply with the plan.[5] In addition, violators are subject to enforcement suits by private individuals.[6]

St. Joe Minerals Corporation operates a zinc-smelting plant at Monaca, Pennsylvania. These facilities emit sulfur oxides, which are the subject of ambient air quality standards established by the Administrator.

During December, 1971, the Commonwealth of Pennsylvania held four days of hearings focused on controlling sulfur oxide pollutants. The Commonwealth then submitted its implementation plan to the Administrator in January, 1972. The regulations published by the Administrator to assist the states in formulating their implementation plans included "Examples of Emission-Limitations Attainable with Reasonably Available Technology."[7] One of the examples was a standard for zinc smelters, such as that operated by St. Joe. The Pennsylvania implementation plan, however, which contained only one standard governing all existing sources of sulfur oxide emissions within the state, concededly was substantially more stringent, when applied to a smelter, than the Administrator's example.[8] Without conducting further hearings the Administrator in May, 1972, approved Pennsylvania's plan in part and disapproved it in part.[9]

St. Joe filed with this Court a petition challenging the Administrator's approval of that portion of the Pennsylvania implementation plan relating to sulfur oxide emissions.[10] St. Joe alleged that the Administrator had not

5. 42 U.S.C. § 1857c-8 (Supp. 1974).

6. 42 U.S.C. § 1857c-2 (Supp. 1974).

7. 40 C.F.P. part 51.

8. According to St. Joe, the Administrator's standard would have required St. Joe to recapture approximately 94% of the potential sulfur oxide emissions. The Pennsylvania plan requires recapture of approximately 97%.

9. 37 Fed. Reg. 10842, 10889-91.

10. Similar petitions were filed by Duquesne Light Co., Pennsylvania Power Co. and Ohio Edison Co.

fulfilled certain procedural requirements, and asked that the case be remanded to the EPA. On January 22, 1973, this Court granted the motion for a remand without specifying the type of procedure to be followed by the EPA on the remand. The EPA moved for clarification of the order or for a rehearing. On the motion for clarification, after consideration of the record of the state proceedings, this Court stated that it was not convinced that St. Joe had been afforded "a truly meaningful hearing" regarding the technological and economic feasibility of the Pennsylvania implementation plan. Moreover, the Court indicated that events since the state proceedings may have rendered the plan outdated. The EPA, therefore, was ordered either to grant St. Joe a limited hearing on the technological and economic feasibility of the plan or to suspend enforcement of the plan against St. Joe while the company pursued "with due diligence" state administrative and judicial remedies for its unfeasibility claims.[11]

Pursuant to this Court's ruling, the EPA elected to conduct an administrative hearing on the feasibility of the plan. After considering written and oral presentations by St. Joe, the Commonwealth and the EPA staff, the Administrator, in a decision announced March 18, 1974, concluded that the Pennsylvania provisions relating to sulfur oxide emissions "as applied to St. Joe Minerals Corporation's smelter . . . [are] technologically infeasible." He therefore did not reach the question of economic feasibility. The Administrator, however, interpreted the Clean Air Act Amendments "as precluding any disapproval of the plan on that basis." He proposed instead to notify the Commonwealth of his finding of technological infeasibility and to request a revision. Furthermore, he proposed to stay federal enforcement of the plan pending state administrative and judicial review of the plan.

11. Duquesne Light Co. v. Environmental Protection Agency, 481 F.2d 110 (3d Cir. 1973). The implementation plan remained in effect as to all potential polluters except St. Joe, Duquesne Light, Pennsylvania Power and Ohio Edison.

St. Joe petitioned this Court to review the Administrator's refusal to disapprove the plan, alleging that the Administrator's refusal was based on an erroneous construction of the law.[12]

II.

St. Joe contends that where the state has not provided an adequate hearing on the issues of the technological and economic feasibility of an emission limitation in a state implementation plan and the limitation has not been demonstrated to be essential to the achievement of a primary or secondary ambient air quality standard, the Administrator must disapprove the limitation when he has found it to be technologically or economically infeasible. The Administrator, on the other hand, argues that if the criteria set forth in section 110(a)(2) [13] are satisfied, sec-

12. 42 U.S.C. § 1857c-5 (Supp. 1974) requires that the Administrator either "approve" or "disapprove" the plan within four months of submission.

13. 42 U.S.C. § 1857c-5(a)(2) (Supp. 1974)

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not

tions 110(a)(2) and 116[14] require him to approve a provision of an implementation plan even though he has found the provision to be technologically or economically infeasible and more restrictive than is necessary to attain national ambient air quality standards. According to the Administrator, to obtain a revision of the implementation plan so as to conform to that which is technologically and economically possible, St. Joe must resort to state administrative and judicial review. Furthermore, confining St. Joe to state review, the agency suggests, is not inappropriate since the Administrator has stayed federal enforcement of the provision in question.

III.

Although judicial review of the actions of administrative agencies is limited in scope, the Administrator's approval of the sulfur oxide provision of the Pennsylvania implementation plan cannot escape review by the Court of Appeals if the agency's decision is founded upon an incor-

13. (Cont'd.)

interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

14. 42 U.S.C. § 1857d-1 (Supp. 1974).

rect conclusion of law.[15] Therefore, we must determine whether, under the circumstances here, sections 110 and 116 compel the Administrator to approve the provision of the Pennsylvania plan that he has found technologically infeasible.

There appears to be no opinion which squarely addresses the precise issue raised on this appeal. However, an interpretation of the Clean Air Act Amendments empowering the Administrator to disapprove the Pennsylvania plan if he found it technologically unworkable is implicit in our decision in *Duquesne Light*. If the Administrator has no authority to disapprove such plan or provision, there would have been no cause to remand the case to the EPA so as to conduct a hearing on precisely this subject. Indeed, the agency argued in *Duquesne Light*, in urging a denial of the remand, that the statute had not intended the Administrator to consider economic and technological factors. Yet we ordered the remand.

The Court's earlier decision in Getty Oil Co. v. Ruckelshaus[16] is premised upon a similar reading of the duty of the Administrator under sections 110 and 116. In *Getty Oil*, Getty operated an oil refinery in Delaware and supplied fluid petroleum coke, a by-product, to Delmarva Power and Light Co., which operated a nearby power station. Delmarva, in turn, supplied electricity and steam to the refinery. As part of its implementation plan, Delaware imposed a limit on the sulfur content of fuels burned in the area in which the Delmarva station was located. This portion of the implementation plan was approved by the EPA, and neither Getty nor Delmarva sought judicial review. However, Getty subsequently asked the state to grant the power station a variance so as to delay the effective date

15. 5 U.S.C. §§ 701(a), 706 (1965); Delaware Citizens for Clean Air v. Admin., 480 F.2d 972, 975-76 (3d Cir. 1973); Pennsylvania v. E.P.A., No. 73-2121 (3d Cir., June 28, 1974). *See* United States v. Allan Drug Co., 357 F.2d 713 (10th Cir. 1966), *cert. den.* 385 U.S. 899 (1966); Kovac v. I.N.S., 407 F.2d 102 (9th Cir. 1969); Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968).

16. 467 F.2d 349 (3d Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

of the sulfur restriction. The relevant state administrative agencies denied the variance, but when Getty sought review in the Delaware courts, it obtained an order restraining the state from enforcing the sulfur limitation.

While the state was so restrained, however, the EPA ordered Delmarva to comply with the implementation plan EPA had already approved. Getty asked this Court to review the compliance order. That order, Getty alleged, deprived Getty of due process because national primary air quality standards had already been met in the area without compliance, and because compliance, prior to the development of alternative technology, would therefore impose an unreasonable economic burden on Getty and Delmarva. Significantly, this Court held that Getty at that time was barred from obtaining judicial consideration of its claims of technological and economic infeasibility since Getty could have obtained such review at the time EPA approved the implementation plan. Section 307(b),[17] the Court reasoned, bars subsequent scrutiny of any claim that could have been reviewed by a court of appeals at the time of the Administrator's approval of the plan.

An essential underpinning of this Court's decision in *Getty Oil* was the conclusion that the Court could have considered technological and economic objections to the state implementation plan when the EPA approved it. If a court of appeals is empowered to review, and presumably reverse, the Administrator's approval on technological and economic grounds, then surely the Administrator has the authority to review the plan on those same grounds and disapprove the plan, or a portion of it, if he finds it unreasonable.

17. 42 U.S.C. § 1857h-5(b):

(b)(1) . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

The Court of Appeals for the Fourth Circuit has reached a similar conclusion with respect to the function of the EPA when it considers implementation plans. In Appalachian Power Co. v. E.P.A.[18] the Administrator argued that his task in reviewing implementation plans was largely ministerial and that he does not consider either the technological or the economic feasibility of the state plan before approving it. The court concluded, "We take no such narrow view . . . of the Administrator's role in evaluating the state plan in connection with his exercise of the power to approve or disapprove."[19]

The Sixth Circuit, like this one, has compelled the EPA to allow interested parties an opportunity to present to the EPA their claims that a proposed implementation plan is technologically or economically impracticable.[20] The Sixth Circuit, therefore, has also implied that the EPA has the power to reject a proffered plan on those bases.

Admittedly, the Act does not expressly empower the agency to disapprove a plan where restrictions are too narrow to be practicable. Certainly, however, Congress would have made its purpose more explicit if it had intended by section 110(a)(2) to limit the Administrator's authority so as to require him to effectuate an implementation plan even though compliance with such plan is technologically infeasible and the constraints in the plan have not been shown to be essential to the accomplishment of the national standards.

A review by the EPA of the feasibility of an implementation plan is not inconsistent with the statutory lan-

18. 477 F.2d 495 (4th Cir. 1973).

19. 477 F.2d at 505. Since the Fourth Circuit had not received the full record which had been before the Administrator it dismissed the motions to remand the matter to the agency, without prejudice to the parties' renewing them after the record had been certified to the Court. 477 F.2d at 507-08.

20. In Buckeye Power, Inc. v. EPA, 481 F.2d 162, 173 (1973), the Sixth Circuit held that the agency was required to conduct a rule-making proceeding in conformity with 5 U.S.C. § 553 to consider, inter alia, the petitioners' feasibility claims. However, unlike this Court in *Getty*, the Sixth Circuit concluded that the petitioners would be entitled to litigate those same claims again in an enforcement proceeding.

gnage. The Administrator is directed to determine whether an implementation plan provides for the attainment of primary ambient air quality standards "as expeditiously as *practicable*" and secondary standards within "a reasonable time."[21] These temporal qualifications suggest that in considering an implementation plan the Administrator should evaluate the workability of the proposed limitations.

Disapproval of an implementation plan for technological reasons is not, as the Administrator argues, barred by section 116.[22] Section 116 provides:

> Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan . . . such state or political subdivision may not adopt any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

The purport of section 116 is merely to permit the state, under state law, to enforce stricter pollution controls than those that are included in the EPA-approved implementation plan, while prohibiting the states from adopting any measures less restrictive than the applicable federal implementation plan. Section 116 does not prevent the Administrator from adopting in an implementation plan a restriction which is less severe than that which the state chooses to enforce under state law.[23]

21. 42 U.S.C. § 1857c-5(a)(2)(A) (Supp. 1974) (emphasis added)

22. 42 U.S.C. § 1857-d(1) (Supp. 1974).

23. The conference committee report on the 1970 Amendments to the Act states only that:

> Except with respect to standards for moving sources [of pollutants], the states' authority to adopt and enforce standards is applicable to air-quality and emissions is retained in the conference substitute [bill]. Reprinted at 3 U.S. Code Cong. & Admin. News 5373 (91st Cong. 2d Sess. 1970).

Also, the procedures for evaluating an implementation plan prior to the Administrator's acceptance of it reflect the importance of technological and economic factors not specifically mentioned in section 110. The Administrator is given four months to review the plan proposed by the state.[24] During that period the plan is evaluated by a committee composed of representatives of other federal agencies such as the Federal Power Commission, the Department of Transportation, Labor, Commerce, and the Interior, as well as the Office of Management and the Budget. According to the Administrator, this committee "review[s] the aggregate impact of all these implementation plans" and provides assistance "in determining the availability of fuels, transportation programs, and public and private sector investment."[25] As the Fourth Circuit has observed, "It is inconceivable that these agencies, acting with the Administrator, in determining 'the aggregate impact' of the plans and 'in determining the availability of fuels, transportation programs and public and private sector investment,' do not consider and evaluate the technological and economic aspects of the plans under review."[26]

IV.

The effect of the Administrator's approval is not, as the agency has claimed, nullified by the Adminstrator's statement that he will stay enforcement of the plan by the EPA pending reconsideration by the Commonwealth. The decision to stay is not binding on a successor to the present Administrator. Indeed such a stay would not be enforce-

23. (Cont'd.)

Moreover, section 116 is derived from section 108 of the Air Quality Act of 1967, P.L. 90-148, which provided:

> Nothing in this Title shall prevent a state . . . from adopting standards and plans to implement an air quality program which will achieve a higher level of ambient air quality than approved by the Secretary.

24. 42 U.S.C. § 1857c-5(2) (Supp. 1974).

25. *See* Hearings, Senate Subcomm. on Air and Water Pollution, Comm. on Public Works, 92d Cong., 2d Sess. (1972), at 230, 236, 256.

26. Appalachian Power Co. v. EPA, 477 F.2d 495, 506 (4th Cir. 1973).

able by St. Joe even against the present Administrator. Moreover, St. Joe is left vulnerable to private civil actions, authorized by the Act, that might be brought to enforce compliance by St. Joe with the approved implementation plan.[27] Thus, the approval of the plan by the EPA has concrete adverse consequences for St. Joe despite the Administrator's undertaking to stay enforcement until the Commonwealth has reconsidered its plan.

For the foregoing reasons, the approval by the Administrator will be vacated and the matter remanded to the Administrator for action consistent with this opinion.

27. 42 U.S.C. § 1857h-2 (Supp. 1974).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1543

ST. JOE MINERALS CORPORATION,
Petitioner

vs.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR REVIEW OF THE ORDER OF THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

Present: ALDISERT, ADAMS and HUNTER, Circuit Judges

JUDGMENT

This cause came on to be heard on the certified list in lieu of the record from the Environmental Protection Agency and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the approval of the Administrator of the said Environmental Protection Agency be, and the same is hereby vacated and the matter is remanded to the Administrator for action consistent with the opinion of this Court.

ATTEST:

Clerk

January 29, 1975

APPENDIX C

Section 110(a)(2) of the Clean Air Act, as amended, 84 Stat. 1680, 42 U.S.C. 1857c–5(a)(2), provides as follows:

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h–1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.